

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Dan Haglin,

Complainant,

vs.

Robert Cunniff and Cunniff for State
House Committee,

Respondents.

**FINDINGS OF FACT,
CONCLUSIONS, AND
ORDER**

On November 15, 2012, the above-entitled Fair Campaign Practices Complaint came before a Panel of three Administrative Law Judges: Jeanne M. Cochran, James Kohl and Barbara L. Neilson.

The matter was submitted to the Panel based on the record created at the October 18, 2012, Probable Cause hearing and the underlying record, including the Complaint, the Prima Facie Determination and the Probable Cause Order. The OAH record closed on November 1, 2012, with the receipt of the written submissions of the Parties waiving the evidentiary hearing.¹

STATEMENT OF THE ISSUE

Did Respondents violate Minn. Stat. § 211B.04 in connection with a campaign radio advertisement that was broadcast prior to the November 2012 general election?

The Panel concludes that the Complainant has established by a preponderance of the evidence that Respondents violated Minn. Stat. § 211B.04. The Panel concludes further that it is appropriate to assess Respondents a civil penalty of \$150.

Based on the record and proceedings herein, the undersigned panel of Administrative Law Judges makes the following:

¹ On October 5, 2012, the Respondents submitted a Waiver of Right to Hearing and Submission Regarding Penalty Imposed. On October 8, 2012, the Complainant submitted a Responsive Submission Regarding Penalty to be Imposed. On October 12, 2012, the Respondents submitted a Reply to the Complainant's Response.

FINDINGS OF FACT

1. The Respondent, Robert Cunniff, was a candidate for the Minnesota House of Representatives for District 8B.²

2. Dan Skogen was a candidate for the Minnesota Senate for District 8.

3. At the request of Mr. Skogen, Mr. Cunniff recorded a radio advertisement. In the advertisement, Mr. Cunniff stated:

While I'm working hard to earn your vote, I want to ask that you also support Dan Skogen for Senate, over the last 8 months I've had a chance to get to know Dan, his compassion, his desire to serve, his common sense approach to solving problems. Dan Skogen is one of us and I believe in him and his ability to move the State of Minnesota forward, November 6th make sure you vote for a better tomorrow – vote for Bob Cunniff for House and Dan Skogen for Senate.³

4. The disclaimer at the end of the advertisement stated that the advertisement was paid for by Mr. Skogen's campaign committee.⁴

5. The advertisement was broadcast on two radio stations in Alexandria, 94.3 FM and 100.7 FM. The advertisement ran 39 times, starting in early October.⁵

6. The contracts with the radio stations for purchasing the radio air time indicated that the advertisement was paid for by Mr. Skogen's campaign committee. The total cost for running the advertisements was \$402.⁶

7. On or about October 18, 2012, Mr. Cunniff received an email from the attorney representing the Complainant in this matter. In the email, counsel advised Mr. Cunniff that the advertisement might be in violation of the law.⁷

8. After he read the email, Mr. Cunniff contacted Mr. Skogen and asked him to have the advertisement pulled from the air. Mr. Skogen immediately contacted the radio stations and advised them to stop playing the advertisement. The radio stations pulled the advertisement that day.⁸

² Minnesota House District 8B includes northeast Douglas and eastern Otter Tail counties, and includes the city of Alexandria.

³ Complaint, Ex. A

⁴ *Id.*

⁵ Testimony of Robert Cunniff. (References are to testimony provided at the October 25, 2012, Probable Cause hearing.)

⁶ Complaint Exs. B-D.

⁷ Test. of Cunniff.

⁸ *Id.*

9. After talking with Mr. Skogen, Mr. Cunniff directed his campaign committee treasurer to write a check to the Skogen campaign committee for half the cost of the advertisements. The check, in the amount of \$201, was written sometime after October 18, 2012, and prior to October 22, 2012.⁹

Based upon the foregoing Findings of Fact, the undersigned Panel of Administrative Law Judges makes the following:

CONCLUSIONS

1. The Administrative Law Judge Panel is authorized to consider this matter pursuant to Minn. Stat. § 211B.35.

2. Minn. Stat. § 211B.01, subd. 2, defines “campaign material” to mean “any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election, except for news items or editorial comments by the news media.”

3. The Respondents’ radio advertisement at issue in this matter is campaign material within the meaning of Minn. Stat. § 211B.01, subd. 2.

4. Minn. Stat. § 211B.04, as amended in 2010, provides in relevant part, as follows:

(a) A person who participates in the preparation or dissemination of campaign material other than as provided in section 211B.05, subdivision 1, that does not prominently include the name and address of the person or committee causing the material to be prepared or disseminated in a disclaimer substantially in the form provided in paragraph (b) or (c) is guilty of a misdemeanor.

(b) Except in cases covered by paragraph (c), the required form of disclaimer is: "Prepared and paid for by the committee,(address)" for material prepared and paid for by a principal campaign committee, or "Prepared and paid for by the committee,(address), in support of(insert name of candidate or ballot question)" for material prepared and paid for by a person or committee other than a principal campaign committee.

(c) In the case of broadcast media, the required form of disclaimer is: "Paid for by the committee."

(d) Campaign material that is not circulated on behalf of a particular candidate or ballot question must also include in the

⁹ *Id.*

disclaimer either that it is "in opposition to(insert name of candidate or ballot question.....)"; or that "this publication is not circulated on behalf of any candidate or ballot question."

(e) This section does not apply to objects stating only the candidate's name and the office sought, fund-raising tickets, or personal letters that are clearly being sent by the candidate.

(f) This section does not apply to an individual or association who acts independently of any candidate, candidate's committee, political committee, or political fund and spends only from the individual's or association's own resources a sum that is less than \$2,000 in the aggregate to produce or distribute campaign material that is distributed at least seven days before the election to which the campaign material relates.¹⁰

5. The burden of proving the allegation in the complaint is on the Complainant. The standard of proof of a violation of Minn. Stat. § 211B.04 is a preponderance of the evidence.¹¹

6. The radio advertisement did not substantially comply with the disclaimer requirement contained in Minn. Stat. 211B.04(b).

7. The Complainant has established by a preponderance of the evidence that Respondents violated Minn. Stat. § 211B.04 by failing to include a disclaimer substantially in the form required.

8. It is appropriate to impose a civil penalty of \$150 against the Respondents for violating Minn. Stat. § 211B.04.

9. The attached Memorandum explains the reasons for these Conclusions and is incorporated by reference.

Based on the record herein, and for the reasons stated in the following Memorandum, the panel of Administrative Law Judges makes the following:

¹⁰ Minn. Stat. § 211B.04; Minn. Laws 2010 ch. 397, § 15. The amendment is applicable to campaign material "prepared and disseminated" on or after June 1, 2010.

¹¹ Minn. Stat. § 211B.32, subd. 4.

ORDER

IT IS ORDERED:

That having been found to have violated Minn. Stat. § 211B.04, Respondents Robert Cunniff and Cunniff for State House Committee shall pay a civil penalty of \$150 by December 31, 2012.¹²

Dated: November 20th, 2012

/s/ Jeanne M. Cochran

JEANNE M. COCHRAN
Administrative Law Judge

/s/ James Kohl

JAMES KOHL
Administrative Law Judge

/s/ Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge

NOTICE

This is the final decision in this case, as provided in Minn. Stat. § 211B.36, subd. 5. A party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

MEMORANDUM

The facts in this matter are not in dispute. The radio advertisement at issue promoted the candidacies of both Mr. Cunniff and Mr. Skogen, and both candidates participated in the advertisement's preparation and dissemination. As campaign material, the radio advertisement was required to include a disclaimer substantially in the form provided at Section 211B.04(c). The purpose of the

¹² The check should be made payable to "Treasurer, State of Minnesota" and sent to the Office of Administrative Hearings, P.O. Box 64620, St. Paul MN 55164-0620.

disclaimer requirement is to identify who prepared and disseminated the campaign material.¹³ The advertisement stated only that it was paid for by Mr. Skogen's campaign committee. Because the advertisement was prepared and disseminated by both Mr. Cunniff and Mr. Skogen and advocated for both candidates, it should have been paid for by and identified both candidates' campaign committees.¹⁴

The Panel concludes that the Complainant has established by a preponderance of the evidence that the Respondents violated Minn. Stat. § 211B.04(c) by not including a disclaimer substantially in the form required by the statute. The Panel concludes further, however, that the violation was isolated and inadvertent on Respondents' part and had little, if any, adverse effect on the election. Moreover, the record established that once Mr. Cunniff was made aware of the possible violation, he took steps to immediately correct the error by causing the advertisement to be pulled from the air and having his campaign committee pay Mr. Skogen's campaign committee half of the broadcasting costs.

Based on this record, the Panel concludes that the assessment of a \$150 civil penalty against the Respondents is appropriate in this case.

J.M.C., B.L.N., J.K.

¹³ *Hansen v. Stone*, OAH Docket No. 4-6326-16911-CV (October 28, 2005).

¹⁴ If the radio advertisement was only paid for by Mr. Skogen's campaign committees, it could be viewed as a contribution by Mr. Skogen's campaign committee to Mr. Cunniff. Minnesota Statutes § 10A.27, subd. 9, which is enforced by the Campaign Finance and Public Disclosure Board, prohibits a candidate from accepting a contribution from another candidate's campaign committee